

Bills Committee on Inland Revenue (Amendment)(No. 3) Bill 2009
Follow-up to meeting on 1 December 2009

Items (1), Proposed Amendments to the Draft of the Inland Revenue (2) and (3) (Disclosure of Information) Rules (“IRRs”)

We agreed with Members’ suggestions set out at Items (1), (2) and (3). The revised draft of the IRRs (with latest changes in tracking mode) is summarised at Annex A.

Item (4) The Phrase “despite anything in any enactment”

2. Comprehensive avoidance of double taxation agreements (“CDTAs”) allocate taxing rights between two treaty partners. A company that would otherwise be subject to tax at a certain rate under Hong Kong laws may be entitled to a lower rate (or not taxed at all) because of a piece of subsidiary legislation that implements a CDTA. In such a case, that piece of subsidiary legislation would take precedence over the said Hong Kong laws. The intention of the phrase "despite anything in any enactment" in the proposed s.49(1A) is to ensure that as far as the current law and any subsequent legislation in future may be concerned, they would not inadvertently override a piece of subsidiary legislation that implements CDTAs “in relation to tax under the Inland Revenue Ordinance (Cap. 112)”.

3. The effect of any CDTA and its implementing subsidiary legislation would already be limited to “tax under the Inland Revenue Ordinance (Cap. 112)” and any precedence effect would also be accordingly limited. As each CDTA will be implemented as subsidiary legislation subject to the Legislative Council’s scrutiny, we do not consider it appropriate to impose further limitation on the precedence effect in s.49(1A).

Item (5) The Word “notwithstanding”

4. While we consider that there is no risk of different meaning being attributed to the words "notwithstanding " in the existing s.49(1) and "despite" in

the proposed s.49(1A), as the two provisions mirror each other, we agree to replace “notwithstanding” in s.49(1) with “despite” for the sake of tidiness. The relevant Committee Stage Amendment (“CSA”) is attached at Annex B.

Other item Subjecting the IRRs to Positive Vetting Procedure

5. Having carefully considered Members’ view, we agree to subject the IRRs to positive vetting procedure. The relevant CSA is attached at Annex B.

**Outline of the Proposed Safeguards to be covered by the
Inland Revenue (Disclosure of Information) Rules**

If the Inland Revenue (Amendment)(No. 3) Bill 2009 is enacted, the Administration will propose to make a set of rules, tentatively known as the Inland Revenue (Disclosure of Information) Rules (the Rules) under section 49(6) of the Inland Revenue Ordinance (Cap. 112) (the Ordinance) to stipulate the level of authority required to approve a request for disclosure of information (disclosure request) made under a Comprehensive Avoidance of Double Taxation Agreement (CDTA) and the notification procedure. The main provisions of the Rules are set out in the ensuing paragraphs.

Commencement

2. The Rules will come into operation on the day appointed for the commencement of the Inland Revenue (Amendment)(No. 3) Ordinance 2009.

Approval of Disclosure Requests

3. A disclosure request may be approved only by the Commissioner of Inland Revenue (the Commissioner) personally, or an officer of the Inland Revenue Department not below the rank of chief assessor authorized in writing by the Commissioner personally.

4. The person mentioned in paragraph 3 above

(i) ~~may approve a disclosure request only if he / she is personally satisfied that the request complies with the following criteria -~~

- (a) ~~the request complies with~~ the provisions of the relevant CDTAs;
~~and~~
- (b) ~~the request complies with~~ all procedures applicable to the request that may be specified in any instrument that amends or supplements the relevant CDTAs; and
- (c) ~~unless the Commissioner otherwise permits, the request contains~~
the particulars set out in the **Schedule**.

(ii) ~~may refuse the request if the request does not contain the particulars set~~

~~out in the Schedule.~~

Information that may be Disclosed in Response to the Disclosure Request

4A. The Commissioner must not ~~may~~ disclose any information in response to a disclosure request unless ~~only if~~ the Commissioner is satisfied that the information does not relate to any period before the relevant CDTAs that are applicable to the request come into operation.

Notification of Proposed Disclosure

5. With the exceptions set out in paragraphs 7 and 8 below, the Commissioner must, before any information is disclosed, by notice in writing given to the person who is the subject of the request, –

- (a) notify the person of the request and the nature of the information sought;
- (b) notify the person that he / she may, in writing, within 14 days after the notice is given, request a copy of the information that the Commissioner is prepared to disclose to the requesting government;
- (c) notify the person that he / she may request the Commissioner to amend the information on the grounds that –
 - i. the information does not relate to the person; or
 - ii. the information is factually incorrect,within 21 days after a copy of the information is given by the Commissioner under paragraph 5(b) above.

6. The request for correction of information in paragraph 5(c) above must be made in writing, with grounds for the request and accompanied by any supporting documentary evidence.

7. Notification is not required if the Commissioner has reasonable grounds to believe that –

- (a) all the addresses of the person known to the Commissioner are inadequate for the purpose of giving the notification; or
- (b) the notification is likely to undermine the chance of success of the investigation in relation to which the request is made.

8. If the Commissioner is under a tight time constraint to disclose the information to the requesting government and the failure of disclosing the information within the time constraint will likely frustrate the efforts of the requesting government in enforcing its tax laws, prior notification is not required but the Commissioner must notify the person at the same time when the information is disclosed. The review procedures set out in paragraphs 9 to 11 below will continue to apply in this scenario.

Request to Commissioner for Amendments

9. If the person makes a request for amendment of the information, the Commissioner may fully approve, partially approve or refuse the request. The Commissioner has to notify the person of the Commissioner's decision, with reasons of the refusal (if applicable) and a copy of the information that has been so amended (if applicable).

Request to Financial Secretary for Directions

10. Where the Commissioner partially approves or refuses a request for amendment under paragraph 9, the person may request the Financial Secretary to direct the Commissioner to make the amendment. The request has to be made in writing, within 14 days after the Commissioner's notice in paragraph 9.

11. The Financial Secretary may fully approve, partially approve or refuse the request and his decision shall be final. The Financial Secretary has to notify the person of his decision, with reasons of the refusal (if applicable) and a copy of the information that has been so amended (if applicable).

Schedule

1. The identity of the competent authority.
2. The purpose of the disclosure request and the tax type concerned.
3. The identity of the person who is the subject of the disclosure request.
4. A statement of the information requested for including its nature, the relevance of the information to the purpose of the disclosure request, and the form in which the competent authority wishes to receive the information from the Commissioner.
5. The ground for believing that the information requested is held by the Commissioner or is in the possession of a person in Hong Kong.
6. The name and address of any person believed to have possession of the information requested for.
7. A statement that the disclosure request is in conformity with the laws and administrative practices of the requesting government, that the competent authority is able to obtain the information under its laws or in the normal course of its administrative practice, and that the disclosure request is in conformity with the relevant arrangements.
8. A statement that the requesting government has pursued all means available in its own territory to obtain the information including getting the information directly from the person in relation to whom the information is requested.
9. The tax period for which information is requested.
10. The period within which the requesting government wishes the disclosure request to be met.
11. (If notification to the person who is the subject of the disclosure request is likely to undermine the chance of success of the investigation by the requesting government) A statement confirming that fact and giving the details and the reasons therefor.
12. (In the case of an urgent request where prior notification to the person who is the subject of the disclosure request would frustrate the timely enforcement of the requesting government's tax laws) A statement confirming that fact and giving the reasons for the urgency.

13. Any other information that may assist the Commissioner in giving effect to the disclosure request.

INLAND REVENUE (AMENDMENT) (NO. 3) BILL 2009

COMMITTEE STAGE

Amendments to be moved by the Secretary for
Financial Services and the Treasury

<u>Clause</u>	<u>Amendment Proposed</u>
3	By adding - "(1A) Section 49(1) is amended, in the English text, by repealing "notwithstanding" and substituting "despite"."
3	By adding – "(3) Section 49 is amended by adding – "(7) Rules made under subsection (6) are subject to the approval of the Legislative Council."."